Introduction

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Constitutionalism is a rich vein for philosophical inquiry. For example, what, if anything, makes a constitution legitimate? Is there any difference between a constitution and a Hartian rule of recognition,[1] or between a constitution and other laws? Relatedly, of what if any importance is "writtenness"?[2] And how do the questions of legitimacy, of hierarchical status, and of writtenness bear on such questions as how constitutions should be interpreted (e.g., by reference to original intentions, to common understandings, or to moral rights) and by what institutions (e.g., by courts or by popular bodies)?

Of particular philosophical significance is the relationship among a constitution's authority, its identity, and possible methodologies of interpretation. Thus, if authority stems from acceptance by the governed – whatever that means – then that might suggest that the identity of a constitution can vary from moment to moment because it is dependent on what is accepted as supremely authoritative. And the identity of a constitution might also seem inseparable from the question of what interpretive methodology is correct and even whose interpretation should be authoritative. These possible connections among legitimate authority, identity, and interpretation suggest that debate over constitutional interpretation and judicial review should focus on what we (who?) do accept and what we (who?) should accept as supremely authoritative. On the other hand, if authority stems not from acceptance but from content, how does that change the answers to questions of constitutional identity and interpretation?

Consider the following account of constitutionalism and the various philosophical problems that it entails. At step 1, I begin with my own current views about principles of justice and other aspects of political morality, about principles of wise governance, and about the institutional arrangements best suited to realizing these various principles. If I could impose these principles and institutions by myself, I would do so (unless they included principles, such as democratic side constraints, that prohibited their unilateral imposition). Because I do not have such power, however, I need the assistance of

others, others who will not share all of my views about political morality, wise governance, and institutional arrangements.

At step 2, then, I seek wide agreement on rules of governmental behavior and rules defining governmental institutions that realize my own personal principles and views to a greater extent than any alternative set of such rules on which I can obtain wide agreement. In other words, under my own principles, it is preferable that they not be fully realized than that anarchy prevail (because of lack of wide agreement), but that they be realized as fully as possible consistent with wide agreement. Others who hold different principles and views will reason similarly, which will result in agreement on rules of governmental behavior and rules defining institutions that no one believes are optimal but that most believe are good enough – that is, superior to anarchy.[3] (Obviously, not just any set of rules will be superior to anarchy according to everyone's principles of political morality and wise governance; the rules must be the best that can be widely agreed upon and above everyone's anarchy threshold of acceptability.)

The rules widely accepted at step 2 may be entrenched to various degrees. That is, it may be widely accepted that these rules may not be altered ever, may not be altered for a certain length of time, and/or may not be altered except by extraordinary procedures. We may believe that we have the best rules we can ever have, and that there is far more danger of loss of political wisdom and morality or of political akrasia than there is danger that wide agreement on better rules will be thwarted.

At the moment of agreement on the entrenched rules at step 2, the rules mean what we who have agreed to them mean by them. In other words, we have not merely agreed to certain symbols or sounds, but to particular meanings of those symbols and sounds. Our agreement can be memorialized only in symbolic form, however, which means that the symbols we have agreed upon and what we meant by them can come apart. Therefore, at step 2 we might agree not only on the rules of governmental behavior and institutions, but also on rules about who is to decide at later times what we meant by those rules.

It might be useful, then, to distinguish a constitution as a collection of agreed-upon symbols from a metaconstitution (or preconstitutional rules),[4] with the latter consisting of agreed-upon norms – metarules – about which particular set of symbols is the constitution, who is to interpret those symbols, and whose semantic intentions shall count as the authoritative meaning of the symbols. The constitution and the metaconstitution are inseparable at the moment of agreement in step 2, but they can come apart at any time thereafter. Thus, although we may at some later time lack the earlier substantive agreement regarding the content of the rules that we had at step 2 – for example, we might now disagree about what freedom of speech should cover or about

whether separation of powers is a good idea – we can still have wide agreement on the metaconstitution. And that agreement might still be sufficient under our principles of political morality to favor the constitution over anarchy.

This discussion of the metaconstitution and its relation to the symbolic constitution illustrates various ways that a constitution might change at step 3. First, the symbolic constitution might change without a change in the metaconstitution. Constitutional amendment in pursuance of the (original meaning of the) rules laid down in the symbolic constitution changes the original constitution organically.

Second, a constitutional revolution might occur in which agreement on the first metaconstitution is replaced by agreement on another metaconstitution that in turn picks out a different symbolic constitution. We may draft a brand new constitution, widely agree on what it means and that it is more desirable than the current constitution, and also agree that it, and not the current constitution, shall now be authoritative for us. (Arguably, the United States Constitution itself was the product of such a constitutional revolution.)[5]

Third, the symbolic constitution might remain the same, but the metaconstitution might change. Thus, the original metaconstitutional agreement might be supplanted at step 3 by a new metaconstitutional agreement, one that deems some parts of the symbolic constitution to be nonauthoritative, that substitutes a new understanding of the symbols for their original meaning, or that "ratifies" otherwise improper interpretations of the symbolic constitution.[6]

Just as it is understandable how people of differing moral and political views could nonetheless agree to entrench a set of constitutional rules and metaconstitutional rules, so it is understandable how they might come to agree on new rules and metarules and hence effect a constitutional revolution. Because it is only the agreement that these rules and metarules shall be supremely authoritative that makes them so, any subsequent agreement can supplant the original agreement to this effect. Of course, some who might have gone along with the original agreement and its constitution may not go along with the later one. For them, the new constitution will not be authoritative even if it is obliging. At least, it will not be so if their political-moral beliefs favor anarchy or resistance to the new constitution. But that will be the case for any dissenters from a constitutional agreement as long as their acceptance of the constitution is not necessary to achieve the degree of effectiveness required to sustain the others' acceptance of the constitution.

Why should anyone at step 4 accept as authoritative a constitution or constitutional provision – whether in the original constitution of step 2 or a supplanting constitution of step 3 – if she does not view the constitution or the relevant provision thereof to be morally and prudentially ideal? The reason is the same one we had at steps 1 and 2: an effective set of relatively good en-

trenched rules, even if nonideal, may be ranked by our own ideal political morality as better than either anarchy or any other set of entrenched rules that has a chance of gaining wide agreement.[7]

Finally, there is the question of why we should ever accept any rule or metarule as authoritative – that is, as providing us with a content-independent reason for action. What I have argued thus far is that we can have content-*dependent* reasons – reasons derived from our political morality – to establish and entrench rules that others recognize as authoritative. But why should *we* recognize those rules as authoritative? Why should we not depart from them whenever our political morality marks disobedience as the preferable course? Of course, if our political morality supports these rules as the best we can get agreement upon, then our political morality will never dictate disobedience if that would undermine agreement. But it might well dictate secret disobedience.[8]

This is the central dilemma of rule-following. Following a rule because it is a rule is what is meant by attributing practical authority to the rule. But if practical authority is impossible, claims of practical authority will be false, and hence rules *qua* rules will be undermined, which by hypothesis is morally nonoptimal. So it appears, paradoxically, that it is morally optimal to make claims on behalf of rules that one knows to be false.[9] And what goes for rules generally applies equally to the entrenched rules of constitutional law.[10]

The foregoing is a sketch of my own answers to the philosophical questions about constitutionalism that I have posed. Let me turn now to the answers proffered by the authors in this collection.

Richard Kay's treatment of constitutionalism's philosophical issues is perhaps the closest to the one I have just outlined. For Kay, the purpose of a constitution is to lay down fixed rules that can affect human conduct and thereby keep government in good order. Constitutionalism implements the rule of law: It brings about predictability and security in the relations of individuals to the government by defining in advance the powers and limits of that government.

The price of constitutionalism's securing the rule of law – binding the government by rules laid down in advance of its actions – is rigidity or, put differently, suboptimal response to change. Kay disagrees with Joseph Raz, who argues that judges may from time to time improve law. Constitutionalism, Kay says, sides with risking rigidity rather than risking security. And in response to those like Jeremy Waldron who extol democratic decision-making and the right of majorities to implement their own judgments about individual rights and liberties, Kay argues not only that democracy is not a preemptive value, but that it also may trample rights and, through destabilization, undermine liberty. Constitutionalism prefers the constancy of a single privileged

judgment about powers, rights, and liberties to the inconstancy of shifting democratic decisions.

Kay next takes on those who are skeptical of the capacity of written rules to convey fixed meanings. That skepticism, Kay says, is belied by our everyday experience of successful communication. The idea that we cannot in fact successfully communicate is, according to Kay, "operationally self-defeating."

A constitution's rules are to be interpreted according to the intent of their authors. In the case of the United States Constitution, Kay argues that we *now* accept the lawmaking authority of the framers *then* (in 1789). That is, we now accept a meta- or preconstitutional norm that locates authority in the framers, which in turn means that the Constitution's rules *qua* supreme law mean what the framers meant by them. (I would argue, and I believe Kay would agree, that the actual metaconstitutional norm we accept is more complex and gives a role to Supreme Court precedents that conflict with original intent; indeed, there may be no metaconstitutional norm that commands widespread acceptance except one that leaves all of these matters to the Supreme Court to resolve by a majority vote of the justices.)[11]

Why would we accept the authority of those who acted more than two hundred years ago? Kay contends that for our acceptance of this metaconstitutional norm to be rational, all we need to believe is that the framers did a pretty good job – and, I would add, as good a job as any alternative on which we could possibly achieve widespread agreement. If, on the other hand, we make our acceptance of the Constitution's authority dependent on its squaring perfectly with our present political and moral views, the Constitution's stability – its raison d'être – will be undermined. That is why "reading" the Constitution as containing broad delegations to judges to apply contemporary political and moral views – versus delegations to legislatures to act within the constraints set by fixed rules – is itself antithetical to constitutionalism, the purpose of which is to limit government by rules.

Finally, Kay takes up the problem of how rules can ever be authoritative and make good their claim to allegiance in any case where they produce suboptimal results. His discussion of this and the related problem of how final authoritative decision-makers can be expected to conform to rules with which they do not fully agree merits close attention.

Frank I. Michelman's central concern with constitutionalism is what he calls the authority–authorship syndrome: "We ought to do it because they said so." Constitutions are legislated by human authors. Their norms are intentional creations. Yet, Michelman says, one cannot posit what ought to be; what ought to be is independent of our positing it. Therefore, he asks, how can we accept a rule of recognition that directs us to do what the constitutional authors said because "they said so"?

Basically, the problem Michelman wrestles with is the general problem of rule-following. How can a datable act of human will preempt as a matter of practical rationality one's own current judgment about what ought to be done? The answer, as I have indicated, is paradoxical: We have good moral reasons to posit fixed rules that claim preemptive authority over our moral reasoning. If such authority is impossible, then perhaps we have moral reasons to deceive ourselves, at least in our everyday affairs, so that we come to believe that the impossible is true. Not just the moral advantages of constitutions, but the moral advantages of *all* rules, are at stake.

Michelman has surely identified the deepest problem of constitutionalism, but only because it is the deepest problem of law generally. Even democratic decision-making, which is frequently contrasted with constitutionalism, cannot escape the authority–authorship syndrome. If rules are entrenched for some period of time – and a rule must be so to function as a rule – then even unanimously approved rules are subject to the authority–authorship syndrome. For why should I act against my better judgment *now* just because *I* said so then?

Michael J. Perry's take on constitutionalism is in many respects very similar to Kay's and mine. Like us, he rejects the notion that the Constitution *qua* supreme law is just the configuration of marks on the parchment in the National Archives. Rather, the Constitution is composed of the norms those marks were intended by their authors to symbolize. Like us, he answers the question of why norms should ever be entrenched against majority repeal by reference to distrust of our future politics. Again like us, he argues that present acceptance of constitutional norms posited in the (distant) past is justified by the need for a widely agreed upon constitutional arrangement and the difficulty of recoordinating an alternative superior one. Finally, like us, he notes that because the Constitution of 1789 is authoritative because we now accept a metaconstitutional rule to that effect, a change in the metaconstitutional rule can effect a change in the Constitution *qua* norms even if it does not change the Constitution *qua* symbols. Thus, norms that were not intended by the framers of 1789 (or 1791 or 1868, etc.) – such as the practice of judicial review and finality, or the application of equal protection principles to the federal government – are now part of the Constitution due to a change in our metaconstitutional rule of recognition.

Perry devotes a lot of attention to issues of interpretation. He distinguishes between the norms the framers intended and the specification of those norms. The framers' intentions are authoritative with respect to the identity of constitutional norms but not with respect to their specification, which is the process of deciding what the norm requires in a particular context.

Perry presupposes an ontology of norms such that it is possible for the "norm" but not its applications to be dependent upon the framers' intent. In places Perry refers to specifying "indeterminate" norms, suggesting that he is distinguishing within the universe of intended norms between rules and standards. Standards would be intentional delegations of norm-elaborating authority to other decision-makers, whereas the extension of rules would be totally dependent upon the intentions of their authors.

In other places, however, Perry appears to make a more global claim about norms in general and to assume that the norm can be authorial-intention-dependent while its applications are not. This means that the norm and its applications have different ontological statuses, the former belonging to the realm of fact, the latter to the realm of evaluation.

It would seem, however, that this ontological bifurcation of norms would be difficult to sustain and that it would spill over into all norm-governed activities. Thus, is it possible that when I use the word "dog," its semantic meaning *is* dependent on a psychological fact – did I have in mind canines? – but any particular application (e.g., to wolves or jackals) is purely evaluative and can be at odds with what I had in mind?[12] Perry – quite rightly, I believe[13] – rejects the notion that intentions themselves are purely evaluative, for he attributes facticity to the question of what norms the framers intended. On the other hand, he rejects the position held by Kay and by me that makes the meaning of an intended norm and how it applies inseverable inquiries.[14]

The final part of Perry's contribution focuses on institutional relations in specifying norms. In particular, he is interested in the extent to which the courts should be the primary constitutional norm-specifiers and to what extent they should defer to the norm-specifications of other branches of government.

Joseph Raz's principal focus is the question of a constitution's authority and its source. Raz is, of course, well known for his work on practical authority in general and legal authority in particular.[15] In this respect, Raz's views on constitutional authority are entailed by his general jurisprudential approach.

According to Raz, a constitution has authority if one does better morally by following its dictates than by following one's own moral views. Therefore, a constitution has authority if its authors have sufficient moral expertise and if the moral benefits of its symbolism and the coordination it provides are sufficiently great that society does morally better by following its dictates than by not doing so. What gives constitutional law the basis for its claim of authority is its facticity – its consisting of posited concrete determinations about what morally ought to be done, determinations that can be unpacked without recourse to the less determinate moral considerations the determinations are meant to resolve. For the

facticity of constitutional determinations – together with a sufficient degree of moral expertise in the authors – is what renders a constitution capable of providing enough moral guidance and coordination to make good the claim that we will do better morally by treating it as authoritative.

Raz's account of constitutional authority is thus at bottom the same kind of account that Kay and I give. Raz departs somewhat from us, however, in his account of constitutional interpretation. Raz argues that the three bases for constitutional authority – moral expertise, coordination, and symbolism – cannot support timeless authority. At some point, the claim that we will do better morally by following a particular constitution will become false. So Raz argues that in constitutional interpretation by judges, reasons for remaining faithful to the original meaning of the constitution compete with and can be outweighed by reasons for innovative interpretations.

Now I would claim that "innovative interpretations" is an oxymoron. What Raz is really dealing with is not constitutional interpretation but constitutional change or constitutional revolution. Constitutional change and revolution may be morally desirable in many circumstances, but they are not and cannot be interpretations of the constitution that exists up to that time. Of course, the constitution or metaconstitution may authorize judicial amendments to the constitution, in which case innovative "interpretations" effect change but not revolution. When the understanding, however, is that judges will be faithful to the original meaning, and amendment, if any, is left to other processes, then a forthrightly innovative decision – if it is accepted – will signal a constitutional revolution. Although at the end of his essay, Raz takes up this rejoinder and disputes it, it seems difficult to deny that in many cases of innovative decisions, a new constitution will have supplanted the old one.

The four contributions discussed thus far, despite their differences, display relatively similar views of the philosophical terrain of constitutionalism and indeed take relatively similar positions on the principal philosophical issues. The remaining three contributors, however, depart from this orthodoxy.

Jed Rubenfeld is preoccupied with the same problem of time that Michelman struggles with: Why ought the majority *now* to feel bound by what a majority – even a supermajority – said *then*. Rubenfeld rejects the answer that at least Kay, Perry, Raz, and I offer, namely, that a sufficient number of us (for effectiveness) accept *now* that we are so bound because we believe that the moral advantages so achieved make the old constitution a better moral bet than the vicissitudes of democratic politics. Rubenfeld believes, by contrast, that invoking contemporary consent to be bound, instead of resolving the problem of time, repudiates constitutionalism altogether.

Rubenfeld therefore tries a different tack to solve the problem of how a constitution authored then can legitimately bind now. The solution to the

problem will entail a theory of constitutional interpretation that will give a proper place to each half of law's double nature, namely, datable acts of will (*then*) and right reason (*now*). The methodology of interpreting according to the intent of the constitutional authors subordinates right reason to past will, whereas the methodology of interpreting according to one's views of political morality subordinates past will to right reason.

Rubenfeld argues that true freedom requires commitment over time, for the uncommitted person is not truly free. A constitution represents the commitments of *a* people, commitments that are perforce temporally extended. We are bound *now* to constitutional commitments then because we are the same "people," even if we are not the same individuals, who authored the Constitution. Rubenfeld refers to this central feature of the Constitution as its "writtenness."

At this stage of his argument it would seem that Rubenfeld has solved the problem of time by deeming individuals past and present to be one "people" and by deeming the Constitution to embody the commitments of that "people," but that in doing so he has opted for originalism and thus subordinated right reason to past will. For how do we ascertain "our" commitments except by reference to the intentions of our past selves?

But Rubenfeld denies this consequence of his theory. Commitment, he says, is not the same thing as choice or consent. The latter occur at a particular point in time, whereas commitments are temporally extended.

If not original intentions, then what establishes and defines our commitments? Rubenfeld argues that the proper interpretive methodology for the Constitution as the commitments of a people is what he calls the paradigm-case method of interpretation, which picks out the historical evils to which various constitutional provisions were responses and which employs right reason within the bounds of fidelity to the paradigm cases. In this way, law's dual aspect is given its due, and the problem of time is solved.

Lawrence Sager contrasts historicist and justice-seeking accounts of the United States Constitution. He argues that historicist accounts – those that take the meaning of the Constitution to be dependent on the intentions of the authors – cannot properly answer the question of why the past should govern the present. Sager sides with justice-seeking accounts, according to which the Constitution stands for broad principles of justice that both the popular and judicial institutions of government are obligated to implement.

Sager focuses most of his contribution on two distinctions. The first is the distinction between the part of justice that is constitutionally committed to judicial enforcement and the part of justice that is constitutionally committed solely to legislative protection. The second is the distinction between the part of justice that has been constitutionalized and the part that has not been. The second

distinction seems problematic given the first: If not all of justice is constitutionally committed to the judiciary for enforcement, why should it matter whether the part remaining entirely in the hands of the legislature is deemed "constitutional" or "nonconstitutional"? After all, the courts will not overturn the legislative judgments in either case. And presumably the legislature is as morally obligated to pursue justice outside the constitutional realm as within it.

It might seem that for Sager the justice-seeking, nonhistoricist Constitution could be reduced to those portions establishing the institutions of government plus the single injunction "Do justice." But Sager denies this. At one point he indicates that the judicial quest for constitutional justice will be "guided . . . by the text of the Constitution," albeit "only broadly." At another, he writes of particular rights that are "insufficiently connected to the dictates of text and history." These sound like points that would be made by a historicist, not by one who endorses justice-seeking constitutionalism.

Perhaps, however, Sager distinguishes between the text of the Constitution, which does constrain the Constitution's pursuit of justice, and the intentions of the text's authors, which do not. The difficulty with this position is that it *does* make us bound "because they said it." We are bound by the framers' intended text. If that text constrains our pursuit of justice as we see it, then Sager has not answered the question he puts to the historicist of why the past so binds us.

Moreover, Sager needs to tell us why the framers' textual intentions bind us but their semantic intentions do not. Or, going in the opposite direction, why are we not bound only by the marks they intended rather than their text, marks that we could turn into a language and text of our choosing and whose meanings would be more conducive to justice-seeking? If authored intentions bind us not only to marks but also to an English text, why do they not bind us all the way down to specific intended meanings? And if they do not bind us all the way down, why do they bind us at all, even at the level of marks?

Near the end of his contribution, Sager hints that, for the United States Constitution at least, the historicist/justice-seeking dilemma may not exist. For he says that "the framing constitutional generations [were] . . . speaking at a high level of moral generality or abstraction in the liberty-bearing provisions of the Constitution." In other words, their *intention* was so general as to be translatable as "Do justice as you see it." We can be both faithful to history and unconstrainedly justice-seeking in constitutional interpretation. We need not choose between the past and the present.

Jeremy Waldron's central concern is the conflict between constitutionalism and democratic decision-making. Waldron quite correctly argues that constitutionalism is not democratic even if it is established democratically. Likewise, a democratic delegation to the courts of the power to invalidate legisla-